Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1792

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,
PETITIONERS,

v.

CHRISTINE M. SWEENEY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The Opinion of the United States District Court for the District of New Hampshire is not officially reported, but is unofficially reported at 14 FEP Cases 1220 and appears in Appendix B of the Petition for a Writ of Certiorari.

The Opinion of the United States Court of Appeals for the First Circuit is officially reported at 569 F.2d 169 (1st Cir. 1978) and appears in Appendix A of the Petition for a Writ of Certiorari.[1]

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on January 4, 1978. A Petition for Rehearing was denied on March 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether under Title VII of the 1964 Civil Rights Act, as amended (hereinafter Title VII), the plaintiff proved a prima facie case that she was discriminated against by the defendants because of her sex when she was not promoted from associate to full professor by showing both specific examples of sex discrimination involving the plaintiff and other females, such as the various efforts of the Affirmative Action Coordinator of the defendant College to deter the plaintiff in this action and overwhelming statistical evidence demonstrating that women, in general, are and have been discriminated against by the defendant College in regard to promotion, hiring and salary.

2. Assuming the plaintiff proved a prima facie case, whether the defendants rebutted the plaintiff's prima facie case.

Statute Involved

The federal statute involved here is Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, *et seq.*, as amended by

[1] References to the pages in the appendices of the Petition for Certiorari appear as (A-), (B-), etc.

the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Portions of the statutory provisions are set forth in Appendix C of the Petition for Writ of Certiorari.

Statement of the Case

Christine M. Sweeney (hereinafter the plaintiff) instituted her employment discrimination case on June 20, 1975, in the Federal District Court for the District of New Hampshire in which she alleged sex discrimination with regard to a failure to be promoted from associate to full professor and with regard to her pay. Defendants were the Board of Trustees of Keene State College, its President, a former Dean, and its then Dean.

The action, as amended, alleged violations of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e, *et seq.*, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, *et seq.*, Fair Labor Standards Act of 1938, 29 U.S.C. §201, *et seq.*, as amended by the Equal Pay Act of 1963, 29 U.S.C. §206(d), Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §1983.

The District Court in its opinion dated April 13, 1977, held that Title VII had been violated but that Title IX and the Equal Pay Act were not applicable as a matter of law, and that the plaintiff's rights under 42 U.S.C. §1983 and the Fourteenth Amendment had not been violated. With regard to Title VII, the District Court found that the plaintiff had set forth a prima facie case of sex discrimination concerning denial of promotion in 1975, which, "The defendants have not rebutted. . . ." (Specific Finding #8, B-25). The Court said that the statistical evidence established a pattern of sex discrimination at Keene State College in hiring, promotion, and salary, and that the defendants failed to rebut that evidence as well.

There were additional Specific Findings that the Affirmative Action Plan was inadequate, particularly in the areas of promotion and salary, that the College utilized a double standard for males and females in the promotion process, and that, if the plaintiff had been a male, she would have been promoted on her second attempt at promotion in 1975.

The defendants appealed the District Court decision, and the plaintiff cross-appealed on various issues, but primarily on the issue of salary and the first denial of promotion in 1973. The Court of Appeals, in its decision of January 4, 1978, affirmed the District Court decision regarding the violation of Title VII but expressed "no opinion" on the District Court's ruling concerning Title IX, Equal Pay Act, 42 U.S.C. §1983, and the Fourteenth Amendment. (A-21). The Court of Appeals indicated that proof of discriminatory intent is critical in a disparate treatment case. However, it said that such evidence need not be "direct evidence," but rather can be circumstantial:

> " 'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. *Washington* v. *Davis*, 426 U.S. 202, 242 (1970).' " (A-10).

Following the rules concerning the allocation of burden of proof articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), the Court of Appeals set forth the burden of proof in Title VII as follows:

> ". . . [A] plaintiff bears the initial burden of presenting evidence sufficient to establish a prima facie case of discrimination. The burden then shifts to the defendant to rebut the prima facie case by showing that a legitimate, nondiscriminatory reason accounted for its actions. If the rebuttal is successful, the plaintiff must show that the stated reason was a mere pretext for discrimination. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence that he or she has been the victim of discrimination." (A-14).

Taking issue with the defendants' position on the burden of proof, which they made before the District Court and the Court of Appeals as well as in their Petition for Certiorari, the Court of Appeals said:

> "What we reject is an effort by the defendants to elevate the quantum of proof to such a level that a litigant is necessarily doomed to failure." (A-10).

The Court of Appeals then cited *International Brotherhood of Teamsters* v. *United States, supra,* in support of plaintiff's use of specific instances of discrimination and statistics to make out a prima facie case, and quoted from the *Teamsters* case as follows:

> " 'We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. . . . Statistics are equally competent in proving employment discrimination. (A-15).

The Court also approved of plaintiff's reliance upon inferential proof of discriminatory motive in a disparate treatment case. (A-16).

After determining that the plaintiff properly employed statistical evidence and individual instances of discrimination, the Court of Appeals then summarized the unrebutted statistical evidence as follows:

> "Dr. Sweeney clearly showed that she was a member of a protected class within Title VII, that she was qualified for promotion, that she was rejected, and that others of her qualifications were promoted. She went further and presented statistical evidence which supports an inference of sex bias in promotion decisions. Most persuasive of the statistics was the fact that only four women in the entire history of Keene State College have achieved the rank of full professor. There have never been more than two women professors in any given academic year and this has occurred in only two years since 1968. In all other years since 1968, only one woman occupied the top rank. In contrast, the number of male professors has gone from ten in 1969-70 to 23 in 1975-76. A similarly striking discrepancy exists in the rank of associate professor. There were only three female associates in 1969-70 and six in 1975-76, while the males in that rank numbered 17 in 1969-70 and 35 in 1975-76. While women represent approximately 20% of the faculty, a figure which compares fairly favorably with the percentage of women in the applicable labor pool, males held slightly more than 90% of the full professor slots in 1969-1970 and 92% in 1975-76. In fact, there have been

> more male professors than male instructors every year since 1969-70, despite the defendants' insistence that entry to the top rank is a significant achievement reserved for the excellent few." (A-16-17).

The Court then cited specific instances of discrimination:

> "In addition to statistical evidence, Dr. Sweeney presented testimony concerning other instances from which sex discrimination could be inferred. An important part of her case centered around the ineffectivness of Keene's affirmative action effort. Although a faculty committee drafted an affirmative action plan in 1973, no such plan was officially adopted until 1976. The current plan, in the form presented to the district court, does not even address the questions of salary and promotion. Moreover, the testimony reveals that the person who nominally served as affirmative action coordinator did virtually nothing to advance the rights of women on the Keene campus. He admitted as much in his own testimony.
>
> "Certainly the most striking evidence presented in this context concerned the affirmative action coordinator's response to Dr. Sweeney's filing of charges with the State Human Rights Commission. Not only did he attempt to get the plaintiff to answer the interrogatories sent to Keene by the Human Rights Commission, a measure which cannot be condoned, he also wrote to the president of Smith College for information on how that school had responded to a charge of sex discrimination because he was 'concerned that that form of anarchy may creep north into our virgin territory.'

"Various witnesses also testified that in their opinion sex bias influenced promotion decisions at Keene. This bias may often be unconscious and unexpressed, but its potential for harm is greatest in reaching decisions on the basis of criteria which simply cannot be objectively measured or definitively stated.

"From our careful review of all the evidence we conclude that the trial court's finding that sex discrimination impeded the plaintiff's second promotion effort was not clearly erroneous." (A-19-20).

Argument

CERTIORARI SHOULD BE DENIED BECAUSE NO NEW SIGNIFICANT LEGAL ISSUES HAVE BEEN RAISED BY THE OPINIONS OF THE COURTS BELOW AND BECAUSE THE DISTRICT COURT'S FINDINGS WERE NOT CLEARLY ERRONEOUS.

Judge Campbell, in his concurring opinion to the opinion of the Court of Appeals in this case, sets forth the principal reason why certiorari should not be granted:

> "In my view the instant case gives rise to no issue of first impression nor does it require taking a philosophical stance on the importance of women's rights *vis a vis* those of a university administration. The question is mainly the traditional one of whether the district court's findings in a close case were clearly erroneous. As they were not, we properly affirm." (A-21-22).

Because there is no conflict of law in the circuits on the legal issues in this case, nothing is to be gained by this Court's review of the case at hand. The nature of proof required for the plaintiff to establish a prima facie case of discrimination has been stated and restated, *Furnco Construction Corp.* v. *Waters*, — U.S. —, 46 U.S.L.W. 4966 (Decided June 29, 1978); *International Brotherhood of*

Teamsters v. *United States, supra; McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); plaintiff's ultimate burden is well settled, *King* v. *Yellow Freight System*, 523 F.2d 879 (8th Cir. 1975); *Naraine* v. *Western Electric Co.*, 507 F.2d 590 (8th Cir. 1974); and no reasonable dispute exists in connection with the perfectly permissible use of inferential proof in a disparate treatment case. *Muller* v. *U.S. Steel Corp.*, 509 F.2d 923 (10th Cir. 1975); *Marquez* v. *Omaha District Sales Office, Ford Division*, 440 F.2d 1157 (8th Cir. 1971); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355 (6th Cir. 1969). The legal issues presented by the instant case consequently do not bear reexamination by this Court. Contrary to the position taken in this case by the defendants, it does not follow from the mere fact that previous defendant educational institutions have successfully weathered Title VII suits that the defendants should ultimately prevail here. Those cases were decided on factual conclusions that no discrimination existed and not, as defendants would have this Court believe, on the philosophical premise that the decision making processes of educational institutions are *a priori* exempt from judicial scrutiny. On the contrary, despite some reluctance of the courts to become intimately involved in the promotional processes of higher education, Title VII was clearly amended specifically to include colleges and universities. The Equal Employment Opportunity Act of 1972, 86 Stat. 103, §3 (1972). The evidence in this case demonstrates gross insensitivity to women on the part of Keene State College and its administrators. The logical conclusion of defendants' "hand-off" posture would be to permit the same sort of egregious discriminatory practices to continue on campuses across the land as exist at Keene State College—and to foster and perpetuate the very ills that Title VII was enacted to eradicate. This Court can-

not, as defendants wish, rewrite the statute to exclude academic institutions from Title VII.

Defendants also erroneously contend that in evaluating the number of women on the faculty, the trial court ignored the number of women in the applicable labor pool. The plaintiff's evidence provided an appropriate basis for the trial court's finding that the plaintiff should have been promoted in 1975 from associate to full professor, including evidence of the available labor market in each of the various academic disciplines at Keene State College. The evidence of intent to discriminate was substantial and included not only statistics but also specific examples of unlawful conduct; and most significantly from the standpoint of the rule set down by *McDonnell Douglas* and its progeny, the statistical data presented to the District Court by the plaintiff was uncontroverted by the defendants.

At the time the plaintiff was hired by Keene State College in January, 1969, her annualized salary, as an associate professor, was $10,0[illegible] The only associate professor making less than plaintiff was another female associate professor, Dr. Dorothy MacMillan, who was earning $9,800. At that time there were 17 male and 4 female associate professors. Other statistical evidence on the number of women in various academic ranks and the average salary of each is as follows:

TOTAL NUMBER OF ACADEMIC EMPLOYEES AT KEENE STATE COLLEGE

YEAR	INSTRUCTOR		ASSISTANT PROFESSOR		ASSOCIATE PROFESSOR		FULL PROFESSOR	
	F	*M*	*F*	*M*	*F*	*M*	*F*	*M*
1968-1969	10	10	5	29	4	17	1	10
1969-1970	11	14	8	35	4	15	1	13
1970-1971	14	13	10	35	4	23	2	15
1971-1972	13	15	9	39	3	23	1	17
1972-1973	17	16	11	40	3	25	1	18
1973-1974	14	9	5	34	6	26	1	19
1974-1975	14	9	7	40	9	34	1	22
1975-1976	11	5	13	42	8	36	2	24

AVERAGE SALARIES PER RANK FOR KSC FACULTY
1969-70 to 1975-1976

YEAR	INSTRUCTOR		ASSISTANT PROFESSOR		ASSOCIATE PROFESSOR		FULL PROFESSOR	
	F	*M*	*F*	*M*	*F*	*M*	*F*	*M*
1969-70	8,000	8,264	9,040	10,083	10,313	11,385	15,300	13,875
1970-71	8,600	9,183	9,625	10,016	11,225	12,177	16,400	14,735
1971-72	8,850	9,617	9,986	10,548	11,525	12,204	14,850	14,997
1972-73	8,900	9,777	10,320	10,782	11,767	12,604	13,900	15,575
1973-74	10,136	10,795	11,263	11,663	13,267	13,695	15,300	16,750
1974-75	11,514	12,178	12,175	13,098	14,839	15,084	16,700	17,941
1975-76	11,733	12,600	12,290	13,190	15,864	15,419	17,750	18,975

The plaintiff's salary as an Associate Professor for each year is *below* the average paid male associate professors:

SALARY OF CHRISTINE M. SWEENEY AT KEENE STATE COLLEGE

1 Semester —	1969	$ 5,000 (annualized $10,000)
	1969-1970	10,000
	1970-1971	10,300
	1971-1972	11,100
	1972-1973	11,500
	1973-1974	13,100
	1974-1975	14,400
	1975-1976	15,200

Although there are a substantial number of women teaching at Keene State College, few have ever succeeded in reaching the upper ranks. In fact, in the history of the College, there have been only four female full professors, one of whom is the plaintiff. Although males without a terminal degree have been promoted to full professor, no woman has been promoted to this rank without her doctorate. There also is a history at Keene State College for males being hired as full professors without having served in that rank in their previous employment while again women with equal, if not superior qualifications, have never been hired into the highest rank but rather forced to serve as associate professors and wait for promotion.

The history of hiring and promotion for the years 1972-74 is as follows:

APPOINTMENTS AND PROMOTIONS
KSC FACULTY INCLUDING WHEELOCK SCHOOL AND LIBRARY
FOR 1972-1974

	APPOINTMENTS			PROMOTIONS		
	1972	1973	1974	1972	1973	1974
Instructors:						
Male	5	0	1	–	–	–
Female	5	2	2	–	–	–
Assistant Professors:						
Male	1	1	0	3	1	6
Female	0	0	1	0	2	2
Associate Professors:						
Male	1	2	2	3	4	6
Female	0	0	0	0	3	3
Professors:						
Male	0	1	0	1	1	4
Female	0	0	0	0	0	0

Again, there is a complete absence of either promotions or appointments of females to the highest rank, while males appear in relatively large numbers.

The defendants' effort to rebut this statistical evidence relies heavily on one fact which they refer to on page five of their Petition, namely, five out of six women were promoted in 1975 (effective July 1, 1976) while only 12 out of 25 men were promoted or given tenure. The defendants fail to point out that in the five out of six promotions of females, none was to full professor.

Similarly, the defendants argue that 20 percent of the faculty is female and if 20 percent of the women are promoted regardless of rank, they have successfully rebutted plaintiff's prima facie case. In so arguing, the defendants in their brief do exactly what they have done in their Affirmative Action Program; they look at total number of females without seeing where females are located

in the various ranks and how much they are paid. This skirts the issue of why women fare so poorly in promotion, pay and hiring. Further, defendants have attempted to discredit the plaintiff's statistical analysis by relying upon certain language in *Hazelwood* v. *United States,* 433 U.S. 186 (1977), which was a case concerned with hiring and not, as is this case, with promotion and salary. In any event, the trial court *did* consider the relevant labor market in its statistical analysis; such evidence was clearly introduced as part of the defendant's Affirmative Action Plan, which set forth the available market in each of the various academic disciplines. (Ex. 70) Consequently, this evidence was before the District Court.

Defendants erroneously argue that the Court of Appeals has raised the level of proof required to dispel an adverse inference from a prima facie showing under *McDonnell Douglas.* By taking a portion of a finding of the District Court out of context, the defendants distort the actual findings of the District Court, specifically, Specific Finding #8:

> "8. The defendants have not rebutted the plaintiff's evidence that they did not discriminate against her by reason of her sex and have not proven that they had a non-discriminatory motive in failing to promote her in the academic year 1974-75." (B-25)

The defendants take the latter part of this finding and on page five of their Petition set it out in italics in an effort to suggest that the Court placed a higher burden on the defendants than is required by *McDonnell Douglas,* forcing them not merely to rebut an inference of discrimination, but must also prove a non-discriminatory motive. That is clearly not incumbent upon the defendants under the rule

established in *Furnco, supra; Teamsters, supra;* and *McDonnell Douglas, supra.* Furthermore, a careful and complete reading of the District Court and the Appeals Court decisions make certain that no greater burden was placed on the defendants than is incumbent upon them under *McDonnell Douglas.* The first part of Specific Finding #8 quoted above makes it clear that the District Court found that the defendants had not rebutted the plaintiff's prima facie case; the balance of the finding is merely surplusage and obviously not determinative of the situation. Likewise, the Court of Appeals, employing the correct test for dispelling the adverse inference to be drawn from a prima facie showing, concluded that the defendants had failed in their efforts to rebut the plaintiff's evidence:

> "The defendant attempted to rebut these statistics by pointing to highly qualified men who remained in the lower ranks longer than Dr. Sweeney. While this evidence is informative, the district court was not required to find that it totally dispelled the inference of discrimination created by the other statistics. Likewise, evidence of males who failed to be promoted on their first try does not necessarily rebut the inference of the plaintiff's more striking statistics. At best, these tales of individual males' struggles account for the district court's conclusion that Dr. Sweeney would not have achieved promotion in her first effort even if she had been a male. It is true that the defendants were able to find instances where an individual male of superior qualifications encountered difficulties in reaching the level of professor. But these examples were countered by other situations where females fared worse. In short, the plaintiff did not prove the existence of a completely consistent pattern, but she

> offered sufficient evidence to sustain the district court's findings.
>
> "Nor can defendants hope to disprove a discriminatory pattern by claiming that they chose outstanding male faculty members for promotion, for 'affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.' *Alexander* v. *Louisiana,* 405 U.S. 625, 632 (1972). The scarcity of women in the upper ranks accounts for their frequent lack of representation on the FEAC and the FAC. The racial or sexual composition of a body which makes subjective evaluations has often been considered a factor in employment discrimination cases. See *Stewart* v. *General Motors Corp.,* 542 F.2d 445 (7th Cir. 1976); *United States* v. *N.L. Industries,* 479 F.2d 354 (8th Cir. 1973)."
> (A-18-19)

In summary, defendants' basic contentions are that:

1. Because all previous cases in the field of academic employment have resulted in findings for the school, this Court should reverse the plaintiff's victory so as to preserve a school's right to act in the area of promotion without regard to the clear statement of the law.
2. The Court of Appeals failed to apply the relevant labor pool analysis.
3. The Court of Appeals has added the requirement that the defendant must disprove a discriminatory pattern in order to rebut a plaintiff's prima facie case.

Taking these one at a time, it should be obvious that the mere fact that the College is unhappy with the result since it is the only school to lose a promotion case because of a

finding of sex discrimination, is not to state a reason at all. The legislative history set forth in the Court of Appeals decision is not only persuasive but leads inescapably to the conclusion that Congress intended colleges, such as the defendant, to be forbidden to discriminate against females in all phases of employment, including promotion. Consequently, the level of proof is controlled by *McDonnell Douglas,* and the scope of review is the same for academic employment cases as for other employment discrimination cases.

The defendants hoping to expand the rule in *Hazelwood,* allege that the District Court and Court of Appeals failed to consider the relevant labor pool. But this conclusion overlooks specific language in the decisions, as well as evidence in the record, namely, Plaintiff's Exhibit 70, the Affirmative Action Program, which did set forth the available market in each of the academic departments. As the Court of Appeals noted:

> "While women represent approximately 20% of the faculty, a figure which compares fairly favorably with the percentage of women in the applicable labor pool, males held slightly more than 90% of the full professor slots in 1969-1970 and 92% in 1975-76. In fact, there have been more male professors than male instructors every year since 1969-70, despite the defendants' insistence that entry to the top rank is a significant achievement reserved for the excellent few." (A-17).

The third element in the defendants' Petition is their claim that the Court put a heavier burden on them than required by *McDonnell Douglas* and *Teamsters* in disproving a pattern of discrimination which plaintiff proved to support her prima facie case. The defendants misread lines from the decisions of the District Court and Court of

Appeals which merely commented on the defendants' evidence and found that they failed in their effort to show there was not a pattern of discrimination. The defendants certainly tried to disprove such a pattern and the Courts found that they failed. This finding does not change the law or place a heavier burden on the defendants, but merely clarifies the point that the defendants failed to rebut the plaintiffs' circumstantial evidence of an intent to discriminate because of her sex. At no time do defendants cite actual language in the decisions which is incorrect as a matter of law.

The defendants are unhappy with the results of the case, not because of the legal findings in the decisions, but rather the findings of fact. The District Court found that they had violated Title VII in failing to promote Christine Sweeney and to support its findings used statistics and specific examples of sex discrimination introduced as evidence, including the evidence that a pattern of sex discrimination exists at the College. Those fact findings were not found to be clearly erroneous by the Court of Appeals and nothing has been stated in the Petition for Certiorari which should cause this Court to grant the Petition.

Conclusion

For the reasons stated above, the Petition for Certiorari should be denied.

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